APPEAL NO. 010901
FILED JUNE 8, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on March 30, 2001. The hearing officer found that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the seventh quarter. She did so based upon a finding that the claimant had no ability to work during the qualifying period.

The appellant (carrier) appeals the hearing officer's decision as being against the great weight and preponderance of the evidence. The carrier points out that there was another record that showed some ability to work during this period. There is no response from the claimant.

DECISION

We reverse and render.

It was stipulated that the qualifying period under review in this proceeding ran from September 23 until December 22, 2000. An applicant for continued entitlement to SIBs is required to make a good faith search for employment commensurate with his/her ability to work. Section 408.143.

28 TEX. ADMIN. CODE § 130.102(d) (Rule 130.102(d)) defines good faith as follows:

> Good Faith Effort. An injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee:
>
> (1) has returned to work in a position which is relatively equal to the injured employee's ability to work;
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> (2) has been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program sponsored by the Texas Rehabilitation Commission during the qualifying period;
>
> (3) has during the qualifying period been enrolled in, and satisfactorily participated in, a full time vocational rehabilitation program provided by a private provider that is included in the Registry of Private Providers of Vocational Rehabilitation Services;

(4) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work; or

(5) has provided sufficient documentation as described in subsection (e) of this section to show that he or she has made a good faith effort to obtain employment.

In this case, the claimant contended that he had a complete inability to work until he was released by his doctor effective December 14, 2000, and then began to search for employment. He had a back injury on _____, worked for some period of time after his injury on light duty, and then left work. He had two back surgeries on August 4, 1999, and January 26, 2000.

As Rule 130.102(d)(4) indicates, the inability to work cannot be established from lay testimony, there must be a narrative from a doctor supporting the complete inability to work and there must be no other records that show an ability to work.

The claimant was examined by a doctor for the carrier, Dr. K, who stated on July 10, 2000, that he felt it was premature to return the claimant to the active workforce. He suggested a functional capacity evaluation (FCE). However, on this same date he filled out a restricted release for the claimant to return to work at a sedentary level until an FCE was performed.

An FCE performed on October 5, 2000, reported that the claimant was at the sedentary level of work ability, and that he demonstrated submaximal effort on testing. He subsequently went through a course of work hardening. The only document from his treating doctor that comments at all on whether he had the ability to work prior to his release in December is a brief letter stating that the claimant was unable to return to work from the date of the FCE through his December 14, 2000, release.

The hearing officer erred in finding that the claimant had no ability to work during most of the qualifying period, and her decision is against the great weight and preponderance of the evidence. No findings have been made on either the existence of a narrative or the failure of other records to "show" an ability to work. The discussion of the hearing officer is no more enlightening on these essential points of entitlement than the findings of fact. This may have been difficult to do given the lack of a narrative and the presence of records which show, on their face, an ability to work at the sedentary level.

We reverse the decision of the hearing officer as not supported by the record or the rules of the Texas Workers' Compensation Commission, and render a decision that

the claimant was not entitled to SIBs for his seventh quarter because he did not search for work commensurate with his ability to work.

Susan M. Kelley
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

DISSENTING OPINION:

My view of this case is somewhat different from that of the majority. I agree that the hearing officer should have addressed in this case the issue of whether or not another document showed an ability to work. However, I do not think that the remedy for this problem is to render a decision of nonentitlement. I think the appropriate remedy would be to remand the case to the hearing officer to address the issue. We have held that whether or not a document shows an ability to work is a question of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. We stated as follows in that case:

> The mere existence of a medical report stating the claimant had an ability to work alone does not mandate that a hearing officer find that other records showed an ability to work.

Gary L. Kilgore
Appeals Judge